Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARK R. SKELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the Petitioner afforded meaningful due process in connection with fact findings used in the imposition of Sentence Enhancements that Increased Defendant's Sentencing Range?

1. Does the decision of the United States Supreme Court in *Apprendi v. New Jersey* require that courts afford criminal defendants jury findings when finding facts that have necessary sentencing consequences less than the statutory maximum?

2. In the light of *Apprendi*, is a criminal defendant entitled to enhanced procedural protections when fact findings have necessary sentencing consequences?

3. Did the district court fail to afford Mr. Skelton the minimum procedural protections required by the Due Process Clause for findings of fact that have necessary sentencing consequences?

II. Should The Defendant should have been allowed a de novo review on all sentencing issues following the vacation of two of three convictions?

III. Should misjoinder of trial of the Defendant with co-defendants be considered harmful error per se under given circumstances?

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This case is an appeal from the Fifth Circuit on the resentencing on remand under Cause Number 00-20268. The original case was appealed in Cause Number 98-20758. The original opinion was dated December 21, 1999 and was unpublished. The second opinion was dated April 4, 2001 and was also unpublished. All opinions are set out in the appendix.

STATEMENT OF JURISDICTION

The motion for leave to file petition for rehearing out of time was granted and the rehearing denied on May 17, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The basis for the jurisdiction of the Fifth Circuit Court of Appeals was 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved are the Fifth and Sixth Amendments and the Federal Sentencing Guidelines. All provisions are set out in the appendix.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

On August 26, 1997, the Petitioner with three others was indicted for bank fraud, 18 U.S.C. § 1344, and one count of criminal forfeiture, 18 U.S.C. § 982 (R 1). Mr. Skelton was charged in Counts One, Two, and Three with bank fraud, (R 1). The others were indicted in one count each. Ira and James Finlay, whose check kiting scheme Mr. Skelton was alleged in

Count One to have aided and abetted, were not charged in this indictment, having reached a separate cooperation agreement with the government. After a jury trial, the Petitioner was found guilty on all counts and sentenced to serve seventy (70) months imprisonment, five-year terms of supervised release, and to pay $3,925,597 in restitution. All defendants appealed. R 327).

On February 9, 2000, the Fifth Circuit overturned the convictions of all defendants Counts Two and Three.(R 374, 382, 383). The court upheld the conviction of Mr. Skelton on Count One, and remanded the case for resentencing (R 382, 383). On resentencing the district court adjusted the restitution and special assessment figures in light of the dismissal of Counts Two and Three and reimposed the same term of imprisonment and supervised release (R 399, 400). The Petitioner appealed (R 398). The Fifth Circuit upheld the resentencing and the Petitioner has brought this application.

B. Statement of Facts The petitioner was a Senior Vice President of a small bank (Westheimer National Bank or WNB) in Houston, Texas. Over a period of roughly a year-and-a half, Mr. Skelton aided and abetted customers Ira and James Finlay in running up a large overdraft on their accounts by granting immediate credit on the deposit of drafts containing automobile drafts and, although all records were accurate and checked on a daily basis, thereby deceived the board of directors of the bank with respect to the true nature and extent of unsecured credit thus extended. *United States v. Melawer*, No. 98-20758, at 2 (5th Cir. 1999).[1] Mr. Skelton also granted immediate credit

1. This Court issued an unpublished opinion. *United States v. Melawer*, 205 F.3d 1337 (5th Cir. 1999) (table case). A copy of the Court's opinion is included in Appellant's Excerpt of Record. Page references to the opinion in this brief are to the copy in the Excerpt of Record.

and allowed overdrafts for the other defendants and many other customers. The three "kites" alleged in the three counts of the indictment were entirely separate events. There was no allegation that they were parts of a single overarching conspiracy or of a single scheme to the defraud the bank.

Ira and James Finlay, the persons who undertook the kite and received $2.5 million from the "kite", had their sentences reduced to time served, approximately 13 months after their testimony at trial.

At the original sentencing the trial court found that the loss attributable to Mr. Skelton for purposes of determining his sentence pursuant to U.S.S.G. § 2F1.1 in connection with the Finlay transactions involved in Count One was $2,490,139.19. The court found that the losses attributable to Counts Two and Three were $380,259.82 and $395,000 (R 322, 330) In addition, the district court found that Mark Skelton's conduct in connection with Counts One through Three of the indictment "substantially jeopardized the safety and soundness of a financial institution," and therefore imposed a four-level enhancement pursuant to U.S.S.G. § 2F1.1(b)(7) (1998) (R 322). The district court found that Mr. Skelton's offense level was 27, and that, having a criminal history score of zero and a Criminal History Category of I, his sentencing range was 70-87 months. (R 322, 330)

On appeal, the Fifth Circuit reversed the convictions of Mr. Skelton, Abraham Melawer, Kenneth Burroughs, and Mark Burroughs on Counts Two and Three. This Court found "no evidence" that Mr. Melawer or the Burroughs possessed any intent to defraud WNB, *Melawer*, *supra* at 6, and therefore that Mr. Skelton could not have "aided and abetted

any scheme to defraud WNB in counts two and three," *id.* The Fifth Circuit Court nonetheless found that there was sufficient evidence to sustain Mr. Skelton's conviction on Count One involving the Finlay accounts. The case was remanded for resentencing. *Id.* at 12. In a footnote, the Court observed: "Skelton's convictions on counts two and three did not affect the guideline range on count one, but resentencing is necessary to allow recalculation of the special assessment and amount of restitution." *Id.* at 12 n.10.

At the original sentencing, the district court raised Mr. Skelton's offense level by four levels based on a finding that his entire course of conduct in connection with Counts One through Three "substantially jeopardized the safety and soundness of a financial institution." U.S.S.G. § 2F1.1(b)(7) (1998) (R 322, 330). The district court made this finding over the objection of Mr. Skelton (R 315), and without the benefit of the presentation of any evidence by the government at the sentencing hearing. (R. 322) The only "evidence" was a series of statements by the probation officer in the PSR concerning the assessment of an unnamed examiner of the Office of the Controller of the Currency. According to the PSR, "*the bank would not have failed had only the Finlay losses been recognized. Rather the capital shortage was the culmination of losses experienced as a result of several accounts.*" (PSR, p. 5, & 10. Emphasis added.)

In short, and read in the light most favorable to the government, the original PSR concluded: (a) that WNB was in deep financial trouble in the period following the discovery of the Finlay, Melawer, and Burroughs overdrafts; (b) that this trouble was caused *both* by the overdrafts and by "loan losses" wholly unrelated to this case or to Mr. Skelton's conduct; and (c) that the Finlay overdraft alone would have been insufficient to cause the failure of the bank.

Once the Fifth Circuit reversed Mr. Skelton's convictions on both Counts Two and Three, the Melawer and Burroughs overdrafts were no longer legally relevant in determining whether Mr. Skelton's *criminal* conduct "substantially jeopardized the safety and soundness" of WNB. Therefore, the Defendant moved that the district court revisit its imposition of the four-level enhancement in light of the new legal posture created by the Fifth Circuit's opinion. (R397-1-2) The district court took the position that she was precluded by the Fifth Circuit opinion in *United States v. Marmalejo*, 139 F.3d 528 (5th Cir. 1998), from addressing any sentencing issue other than the recalculation of the special assessment and amount of restitution mentioned in footnote 10 to the this Court's order remanding Mr. Skelton's case. (Tr. 6-8, 12-13) and reimposed the original sentence. At the resentencing hearing, the government presented no witnesses, documentary exhibits, or any other evidence on the question of whether the Finlay overdrafts standing alone "jeopardized the safety and soundness" of WNB. (R 399, 404).

SUMMARY OF ARGUMENT

There is a split of authority on the issue of de novo review on resentencing. The Fifth and Seventh Circuits do not allow the trial court to consider other factors on resentencing that arise after the appeal. The Second, Sixth, Eighth, Ninth and Tenth Circuits allow such review. Serious issues arose in this case as a result of the overturning of two of three convictions. The trial court was hamstrung and could not reconsider the issue, asserting that *United States v. Marmalejo*, 139 F.3d 528 (5th Cir. 1998), precluded the trial court from considering any issue not specifically mentioned in the Fifth Circuit's footnote restricting the issues on remand.

On the due process issue, this Court has not addressed the procedural due process that should be afforded defendants on fact findings that change the range of punishment. There is a definitive procedure for enhancements as set out in *Apprendi* , but the Fifth Circuit, as have most circuits, has determined that those guidelines do not apply in determination of facts within the maximum sentence even if the decisions dramatically change the range of punishment.

Petitioner's sentence was adjusted under the Sentencing Guidelines from 0-6 months to 70-87 months based on fact findings made by the trial court. This almost twelve-fold increase was made without a jury finding and with no more procedural due process than was mandated prior to the guidelines being implemented. This Court in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) recognized that some fact findings used in sentencing adjustment require a jury finding beyond a reasonable doubt. The fact finding that led to an increase from a maximum six months to almost six years, should be afforded the same or at least enhanced due process. Lastly, the Petitioner was original tried on three counts of bank fraud with three other defendants. The counts were unrelated save and except for the common denominator of the Petitioner. The Petitioner was unfairly prejudiced by the misjoinder of the trials.

REASONS FOR GRANTING THE WRIT

I. The Petitioner was not afforded meaningful due process in connection with fact findings used in the imposition of Sentence Enhancements that Increased Defendant's Sentencing Range.

The present state of the law is unclear as to the procedural due process that must be afforded a defendant when a trial court makes factual determinations under Federal Sentencing Guidelines. This Court has not squarely addressed this issue since the implementation of the Federal Sentencing Guidelines. What is clear, in light of this Court decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), is that a defendant is entitled to meaningful due process when a fact finding substantially effects the sentence imposed. The Fifth Circuit declined to addressed the issue by narrowly reading *Apprendi*. Any one of several scenarios, outlined below, could be implemented by this Court.

A. The decision of the United States Supreme Court in *Apprendi v. New Jersey* invalidates sentences imposed under the Federal Sentencing Guidelines.

Prior to the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, § 218, 98 Stat. 1976, federal criminal sentencing was indeterminate and conferred upon the district court virtually unfettered discretion to sentence a defendant anywhere within the allowable statutory range for the offense or offenses of conviction. There was no limitation on the type or quality of information a judge could consider at sentencing. *See, e.g.*, 18 U.S.C. § 3661. None of the information received was subject to the limitations of the

Federal Rules of Evidence. Fed. R. Evid. 1101(d)(3). Most importantly, the judge was not required to make any findings of fact, for the simple reason that no fact, however compelling or unequivocally proven, could restrict the judge's discretion to impose a sentence anywhere within the statutory range applicable to the offense of conviction. *Koon v. United States*, 518 U.S. 81, 96 (1996)

Many of these settled sentencing practices were, of course, abandoned with the passage of the SRA in 1984 and the advent in 1987 of the Federal Sentencing Guidelines. The Guidelines substituted a system of mandatory sentencing rules. The central distinguishing feature of the Guidelines system is that it ties the length of a defendant's sentence directly to factual findings made by the judge after guilt has been adjudicated by trial or plea. However, a glaring anomaly of the new system is that, while the Guidelines made fact-finding essential to setting sentence length, defendants were granted no greater due process protections at the sentencing hearing than they had been under the old discretionary model. "[T]he sentencing hearing has been transformed by the Guidelines into an adjudicatory proceeding, with fact-finding and application of law to the findings. Yet the procedural rules are vestiges of the previous era of broad judicial discretion, and thus remain distinctly non-adjudicatory." José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go From Here?*, 12 FED. SENT. REP. 208, 210 (Jan.-Feb. 2000).

In the pre-Guidelines era, in *Williams v. New York*, 337 U.S. 241, 249-51 (1949), this Court ruled that due process allows a judge broad discretion as to the sources and types of information relied upon at sentencing, and that due process does not require either confrontation or cross-examination

of witnesses at sentencing. The constitutional logic of *Williams* is rendered obsolete if applied to a modern fact-dependent determinate sentencing system such as the Federal Sentencing Guidelines.

In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), the Supreme Court recognized the changed nature of modern determinate sentencing schemes and held that the due process clauses of the Constitution confer meaningful procedural protections on defendants facing sentences for criminal offenses. In *Apprendi*, this Court ruled that the Due Process Clause of the Fourteenth Amendment required that the finding of bias upon which the enhanced sentence depended must be proved to a jury beyond a reasonable doubt. The Court, in a plurality opinion joined by four justices, relied on two constitutional protections of surpassing importance: the proscription of any deprivation of liberty without due process of law, *Amdt. 14*, and the guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. *Amdt. 6*, *Id.* at 2355. This Court held: (1) The Due Process Clause applies to the determination of criminal sentences, as well as to the adjudication of criminal guilt or innocence. When a judge finds a fact and then increases a defendant's sentence above the level that would be legally available in the absence the factual finding, the defendant suffers a "deprivation of liberty" which triggers his right to procedural process. (2) When the factual finding at issue permits a judge to increase the sentence above the maximum otherwise permissible by statute without the finding, the fact is an "element" of the criminal *prosecution*, and the defendant is entitled to complete trial rights — including a jury trial, confrontation, and proof beyond a reasonable doubt — in the determination of that fact.

The Court might have stopped there. However, both the plurality opinion and Justice Thomas's concurrence were plainly intended to reach beyond the particular circumstances presented by the New Jersey statute at issue in Apprendi's case. For example, the plurality states the general rule to be that a legislature may not remove from consideration by the jury the assessment of facts that increase the prescribed *range* of penalties to which a criminal defendant is exposed. *Id.* at 2363 (emphasis added). This statement states plainly that factual determinations which constrain judicial sentencing discretion by setting minimum penalties, as well as those which set maxima, are subject to due process strictures. Justice Thomas' concurrence faces the point squarely and would hold that any fact which raises either the maximum or the minimum punishment must be subject to jury scrutiny. *Id.* at 2379. *See also*, *id.* at 2401 (Breyer, J., dissenting)

The government will doubtless argue that *Apprendi* does not reach so far, and that it extends only to its particular facts. This assertion is belied, not only by the language of the majority opinions, but by the dissenting opinions of Justices O'Conner and Breyer. Justice O'Conner views the majority's opinion as a watershed change in constitutional law, *id.* at 2380. She reads *Apprendi* as holding "that any fact that increases or alters the range of penalties to which a defendant is exposed which, by definition, must include increases or alterations to either the minimum or maximum penalties must be proved to a jury beyond a reasonable doubt." *Id.* at 2385. Justice Breyer, for his part, suggests that *Apprendi* casts into doubt the constitutionality of the Federal Sentencing Guidelines and all other determinate sentencing systems. *Id.* at 2402.

In total, Mr. Skelton's sentence was increased by twenty-one levels on matters that were not decided by the jury. Those were a two level increase for more than minimal planning, a two level increase for abuse of a position of trust, the four level increase for safety and soundness of the institution, and a thirteen-level increase for amount of "loss." (PSR) The net effect of all these judicial findings of fact was to increase Mr. Skelton's *sentencing range* from 0-6 months (Offense Level 6, the base offense level for fraud cases, and Criminal History Category I) to 70-87 months (Offense Level 27, Criminal History Category I). Consequently, the plain language of the Court's opinion in *Apprendi* can mean nothing other than that Mr. Skelton's sentencing hearings, both before and after his original appeal, were conducted in violation of the Due Process Clause.

It is important to note that there is reason to believe that a jury finding would have caused a different result. In Count Four, the criminal forfeiture count, the jury found that the Petitioner was responsible for only $500,000 of the loss. Count Four was later withdrawn. The difference between the $500,000 found by the jury and the $3,300,000 found by the trial court would result in a four level reduction under the Sentencing Guidelines.

B. The decision of the United States Supreme Court in *Apprendi v. New Jersey* requires that courts afford criminal defendants enhanced procedural protections when finding facts that have necessary sentencing consequences.

Even if the *Apprendi* plurality were to be read not to require a jury trial on all facts that dictate sentencing ranges, it says unequivocally that such factual determinations are subject to meaningful due process protections. For example, Justice Stevens, writing for the Court, observes that, "Since Winship, we have made clear beyond peradventure that Winship's due process and associated jury protections extend, *to some degree*, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." 120 S. Ct. at 2359 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)) (Emphasis added.) The plain implication of this statement is that the due process clause applies to sentence-determinative factual findings, but that there may be factual determinations at sentencing as to which some, but not all, of Winship's due process and associated jury protections must constitutionally extend.

Therefore, at a minimum, *Apprendi* stands for a third constitutional principle, namely that the Due Process Clause also applies to proof of facts which do not increase the statutory maximum possible penalty, but which are dispositive of the defendant's sentencing range below the statutory maximum. The point which this reading of *Apprendi* leaves for resolution by the lower federal courts is the precise degree of procedural protection that the Due Process Clause demands for finding facts that determine a defendant's sentence within the statutorily allowable range.

Although the Defendant contends that *Apprendi* invalidates the Federal Sentencing Guidelines on constitutional grounds, a creative reading of *Apprendi* might sweep less broadly. The Defendant suggests that, although the *Apprendi* dissenters were correct that the majority opinion reaches far beyond the narrow facts of the case, *Apprendi* could be read in a way that does not invalidate the Federal Sentencing Guidelines or other analogous state determinate sentencing systems. On this view, where the dissenters in *Apprendi* err is their unstated assumption that if a defendant is constitutionally entitled to due process at sentencing, then the constitutionally required procedures must be identical to those associated with a criminal trial, including the right to a jury, full confrontation rights, proof beyond a reasonable doubt, etc. The Due Process Clause is not so rigid.

In *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), the Supreme Court observed that, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Quoting*, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

A modern determinate sentencing proceeding is a hybrid, standing somewhere between a full trial on the merits and the purely discretionary proceedings of the pre-Guidelines era. The flexible approach to determining the requirements of due process adopted in *Mathews v. Eldridge* makes it perfectly possible to reconcile the imperative command of the *Apprendi* majority that defendants be given due process protections at sentencing with Justice Breyer's sensible observation in dissent that, "the real world of criminal justice . . . can function only with the help of procedural compromises, particularly in respect to sentencing." *Apprendi*, 120 S. Ct. at 2397. Application of the flexible

analysis of *Mathews v. Eldridge* to Guidelines sentencing in light of command of *Apprendi*, suggests, at least, the following:

First, *Apprendi* requires meaningful procedural protections for criminal defendants whenever there is to be determination of a fact that will "increase the prescribed range of penalties." In the Guidelines context, this rule will apply to any offense level adjustment of three levels or more. This is because, since the top of every sentencing range on the Guidelines sentencing table is identical to the bottom of every range two levels higher, determination of a fact that produces only a one or two level increase will not *necessarily* increase a defendant's sentence. Only an increase of three levels or more will, in itself, necessarily increase a defendant's sentence.

Second, the specific procedural rights triggered by an offense level increase of three or more levels should, at a minimum, include: (a) a right to a meaningful evidentiary hearing as to contested facts; (b) the requirement that, at such a hearing, the government prove the existence of contested facts with some admissible evidence, rather than relying entirely on hearsay memorialized in the presentence report; (c) at least a limited right of confrontation, including a right on the part of the defendant to insist that the government produce and make available for cross-examination at least the principle witness(es) on whom it relies in proving contested facts.

C. Minimum procedural protections are required by the Due Process Clause for findings of fact that have necessary sentencing consequences.

Following this Court's decision to vacate Mr. Skelton's convictions on Counts Two and Three, on remand, the Defendant raised one discrete issue concerning the calculation of his sentence under the Federal Sentencing Guidelines, namely there was no longer sufficient evidence in the record (if indeed there ever had been) to support a factual finding that the "offense" had "substantially jeopardized the safety and soundness" of the bank. The four-offense-level increase of 2F1.1(b)(7) was based on the combined effect of unrelated loan losses and the conduct charged in all three counts. The Finlay "kite" alone would not have caused the bank to fail. Therefore, argued the defendant, absent the losses attributable to the Melawer and Burroughs accounts, the district court was obliged to consider anew whether the evidence was legally sufficient to support the imposition of the 2F1.1(b)(7) increase.

The response of the district court might have been a model for the cavalier approach to finding sentencing facts that so concerned the Supreme Court in *Apprendi*. The district court held no evidentiary hearing on the issue. The court did not insist that the government present any admissible evidence at all, but relied entirely on double hearsay statements in the PSR in which the probation officer said what he interpreted the OCC examiners to have said. The government presented neither evidence nor argument. The defendant was afforded no right of confrontation, however limited. Finally, there is no indication of what standard of proof the court employed in assessing the "evidence" and denying the defendant relief. In short, the

district court found a "fact" that increased Mr. Skelton's offense level by more than three levels, and sent him to prison for an additional one to two years, without affording him any meaningful due process at all. *Sentencing Table*, U.S.S.G

Even before *Apprendi*, the government bore the burden of proving by a preponderance of the evidence facts supporting an enhancement. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990).

As the Eleventh Circuit observed in *United States v. Lawrence*, 47 F.3d 1559, 1567 (11th Cir. 1995):

> While the Guidelines allow a district court to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy," U.S.S.G. 6A1.3(a) (Nov. 1, 1994), this relaxed evidentiary standard does not grant district courts a license to sentence a defendant in the absence of sufficient evidence when the defendant properly objects to a PSR's conclusory factual recitals.

This Court need not apply the stricter due process standards called for by *Apprendi* to conclude that the sentencing judge erred in the present case. Even a cursory reading of the record reveals that the defendant received no meaningful hearing on the serious issue posed by the changed evidentiary posture of the case following the dismissal of Counts Two and Three. There was *no evidence* in the record as to whether the Finlay "kite", standing alone, "substantially jeopardized the safety and soundness" of WNB. Faced with

a difficult factual and legal question calling for (a) additional evidence from expert witnesses, and (b) careful analysis of such evidence in light of the applicable legal standard, the district court neither called for evidence nor performed legal analysis. Rather, the court imposed a sentence enhancement that condemned Mark Skelton to an additional two years in prison based on the speculation, totally unsupported in the evidence, that $800,000 would not "make a difference" to the fiscal soundness of a small bank.

II. The Defendant should have been allowed a de novo review on all sentencing issues following the vacation of two of three convictions.

There is a split between the circuits on the issue of the authority of the trial court to consider issues not raised in the initial sentencing appeal. The Fifth Circuit, joined by the Seventh Circuit, believes that an unfettered look at the issues on sentencing allows the defendant an unfair "second bite at the apple". *United States v. Marmolejo*, 139 F.3d 528 (5th Cir. 1998); *United States v. Parker*, 101 F.3d 527 (7th Cir. 1997). Other circuits follow the position that de novo sentencing gives the district court the discretion to balance all the competing elements of the sentencing calculus. *United States v. Saikaly*, 207 F.3d 363 (6th Cir. 2000); *United States v. Caterino* 29 F.3d 1390 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Smith*, 930 F.2d 1450 (10th Cir., 1991); *United States v. Sanchez Solis*, 882 F.2d 693 (2d Cir. 1989).

In *United States v. Marmalejo*, 139 F.3d 528 (5th Cir. 1998), the Fifth Circuit held that:

> The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs no more, no less. All other issues *not arising out of this court's ruling* and not raised before the appeals court, *which could have been brought in the original appeal*, are not proper for reconsideration by the district court below. 139 F.3d at 531. (Emphasis added.)

In this case, there are issues that, although they could have been argued on a theoretical or hypothetical basis on the initial sentencing, did not really become factors in the sentencing until after the first opinion in which two of the three convictions were overturned. It was the overturning that materially altered the evidentiary foundation for the adjustment under the Sentencing Guidelines. To require that the issues be raised in the initial brief would be an unwise use of limited judicial and legal resources. Particularly in cases with multiple defendants and multiple counts, Counsel would have to brief, and the Courts consider, different combinations and permutations which, in all likelihood, would never be relevant.

At the original sentencing hearing, as noted above, the district court imposed a four-level upward adjustment pursuant to U.S.S.G. 2F1.1(b)(7) At the time this finding was made, the "offense" included all the conduct charged in Counts 1-3 of the indictment, which is to say the Finlay,

Melawer, and Burroughs "kites" Once the Fifth Circuit reversed the convictions of Mr. Skelton, Mr. Melawer, and the Burroughs on Counts Two and Three, the conduct charged in those counts — and any financial loss to the bank arising from that conduct was no longer part of the "offense," and thus was legally irrelevant to the question of whether the "offense" substantially jeopardized the safety and soundness of WNB.[2]

By virtue of the dismissal of Counts Two and Three, the loss attributable to Mr. Skelton's offense was diminished by nearly $800,000. Moreover, at the original sentencing, the trial court imposed the adjustment pursuant to U.S.S.G.

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2. In some circumstances, of course, conduct underlying dismissed or acquitted counts may be considered part of the relevant conduct which serves as the evidentiary basis for applying a sentence enhancement. *See* U.S.S.G. § 1B1.3, and *United States v. Watts*, 117 S. Ct. 633 (1997) (holding that acquitted conduct may be considered as part of relevant conduct for purposes of applying the Guidelines even though a jury did not find guilt beyond a reasonable doubt). However, in order for dismissed or acquitted conduct to be considered as part of "relevant conduct" under § 1B1.3, the sentencing judge must find that the conduct has been proven by at least a preponderance of the evidence. *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989). Two considerations preclude application of this general principle to the present case: (1) In its opinion vacating the convictions of all defendants on Counts Two and Three, the Fifth Circuit found, not merely insufficient evidence, but "no evidence" of criminal intent on the part of Mssrs. Melawer, Burroughs, and Burroughs. *United States v. Melawer*, *supra* at 6. Consequently, regardless of the applicable burden of proof, as a matter of law, Mr. Skelton cannot be found to have aided and abetted persons as to whom the government has presented "no evidence" of criminal intent. (2) In Mr. Skelton's case, at the resentencing, the district court made no finding that Counts Two and Three had been proven by a preponderance of the evidence.

2F1.1(b)(7) based on the assertion by an OCC examiner that the perilous condition of the bank was caused by the combined effect of all three alleged check kites and of loan losses unrelated to this case. There was no occasion at the original sentencing hearing for the sentencing judge to consider the question of whether the offense charged in Count One *alone* had substantially jeopardized the safety and soundness of WNB. Accordingly, the decision of this Court vacating Mr. Skelton's convictions on Counts Two and Three created a factual issue that *did not exist*, and which the district court therefore did not consider, at the original sentencing.

When Mr. Skelton's case came on for resentencing following the Fifth Circuit remand, the Defendant requested that the district court reconsider the adjustment for substantially jeopardizing the safety and soundness of the bank in light of the dismissal of Counts One and Two. (R 397). The district court refused to do so on the ground that she was barred from addressing the issue by the rule of *Marmalejo*.[3] Thus the harm.

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3. When counsel for Mr. Skelton raised the issue of the effect of the dismissal of Counts Two and Three on the § 2F1.1(b)(7) adjustment, the following colloquy ensued:

> THE COURT: . . . Do you have a case that's different from what the Fifth Circuit says in Marmalejo that says that a district court can only address the issue arising out of the remand that's sent to it by the appellate court and not another issue? You got another case?
>
> MR. SMITH: You Honor, I don't have a case to quote you, but I do have that this is an issue that arises out of the remand because it was remanded without three

(Cont'd)

It is true that in a footnote to its opinion remanding Mr. Skelton's case for resentencing, the Fifth Circuit stated that, "Skelton's convictions on counts two and three did not affect the guideline range on count one, but resentencing is necessary to allow recalculation of the special assessment and amount of restitution." *United States v. Melawer, supra* at 12 n.10. With the utmost respect, the Petitioner suggests that this statement was premature. The effect on the four-level § 2F1.1(b)(7) adjustment of a dismissal of only Counts Two and Three had, unsurprisingly, never been raised or briefed by either party. The necessity of considering the question only arose after the court of appeals issued its decision.

Once the case was returned to the district court for resentencing, the district judge was undeniably in an awkward

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(Cont'd)

> convictions but, rather, with one conviction. And the issue was whether or not the institution would have failed without the other two.
>
> THE COURT: I'm definitely not getting into that. There is just no way I am getting into that. I am telling you that's not happening. And if you think I am in error, tell the Court of Appeals. But they say that I don't have any authority to do that; that's the only that I can do is the thing that they've sent back to me because of whatever issue you raised on appeal. It's like using me as the Court of Appeals. I'm not the Court of Appeals. You gave your beef. They sent it back to me and they said, "This is what you were wrong on. You shouldn't have convicted him on Counts 2 and 3, only 1. The restitution amount is wrong. Do that over. The guideline range on Count 1 is not affected by the appeal." I don't think that there's anything else I can do. (R- , Tr. 6-7)

position. The Fifth Circuit seemed to have limited the issues to be considered on remand, but at the same time, the Fifth Circuit's opinion changed the posture of the case in such a way as to raise a sentencing issue that had not hitherto existed.

The facts of this case illustrates why the restrictions do not make sense. There was no reason for the litigants to anticipate sentencing arguments based on the speculative possibility that the court of appeals might vacate some counts while upholding others. More to the point, there was no factual record from the original sentencing upon which such a challenge could have been based. The premise of the PSI's conclusion that the § 2F1.1(b)(7) adjustment should be imposed was that the combination of the losses caused by all three "kites" jeopardized the bank and ultimately caused it to fail. The question of whether any single one of the kites "substantially jeopardized the safety and soundness" of WNB was never asked.

The error was caused by an understandable reluctance to look beyond the apparent limitations imposed on the remand by the court of appeals, nevertheless the error remains and Mr. Skelton should not be penalized for it.

III. Misjoinder of trial of the Defendant with co-defendants deprived the Petitioner of a Fair Trial

The misjoinder of defendants has been decided by this Court to be subject to the harmless error analysis. *United States v. Lane*, 474 U.S. 438 (1986). However, in *Lane*, the Court found that there was overwhelming evidence of guilt and that the same evidence would be admissible in the event of a retrial. Neither of those factors are in this case. In the absence of the two important factors, misjoinder should be considered prejudicial per se.

The Fifth Circuit ruled that there was no evidence of intent and reversed two of the three convictions. The only proof of intent on the third count was the virtually unsubstantiated testimony of a co-conspirator who said that he paid the Petitioner money. No money or trail of money was ever introduced. What was introduced into the trial was the innuendo that there was a pattern of corruption. If he was being paid on one, he must have been being paid on the others. The evidence of the series of kites would not have been admissible if the Petitioner had been tried on each count separately. Further, because he was being tried along with the other co-defendants, the Petitioner was unable to call the other defendants to refute the implication. Absent the compelling factors cited in *Lane*, the long standing rule of *McElroy v. U.S.*, 164 U.S. 76 (1896) should apply. Misjoinder under these circumstances should be reversible error per se. The burden should not be placed on the defendant to show that there was harm.

CONCLUSION

For all the foregoing reasons, defendant Mark Skelton respectfully requests that his case be afforded the full protection of the constitution and that this Court grant the writ requested.

Respectfully submitted,

CHARLEY L. SMITH
Attorney for Petitioner
P.O. Box 865
Bellville, Texas 77418
(979) 865-5905

APPENDIX

Appendix A

Guidelines of the sentence of Defendant-Appellant Mark R. Skelton. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(7)(A) (1998). This court's opinion in Skelton's initial appeal limited the district court on resentencing to recalculation of the special assessment and the amount of restitution. "[T]he resentencing court can consider whatever this court directs — no more, no less. All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below." *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998). We are not persuaded that Skelton could not have raised in his initial appeal the issue of whether affirmance of his conviction on less than all counts required reconsideration of the determination that Skelton's offense substantially jeopardized the soundness of Westheimer Bank.

Skelton's further argument that, under the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), facts affecting his sentence were required to have been proved to a jury beyond a reasonable doubt is foreclosed by this court's opinions in *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (stating that *Apprendi* is "limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines"), and *United States v. Meshack*, 225 F.3d 556, 576-77 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 834 (2001), *amended on reh'g in part*, __ F.3d __, 2001 WL 224656 (2001).

Skelton's sentence is therefore AFFIRMED.

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOLDING SESSION IN HOUSTON) DATED APRIL 4, 2000 AND ENTERED APRIL 10, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Holding Session in Houston

Case Number: 4:97CR00169-001

UNITED STATES OF AMERICA

v.

MARK R. SKELTON

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

O.W. Bussey, Jr.
Defendant's Attorney

Date of Original Judgment: October 5, 1998

☑ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

* * *

Appendix B

THE DEFENDANT:

* * *

☑ was found guilty on count(s) 1, 2, and 3 on April 13, 1998 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1344 and 2	Bank Fraud	03/13/1993	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 2 and 3.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.:
451-82-6377

March 20, 2000
Date of Imposition of Judgment

Defendant's Date of Birth:
11/28/1947

Defendant's USM No.:
76295-079

s/ Vanessa D. Gilmore
Signature of Judicial Officer

Defendant's Residence Address:
825 S. Oak
Bellville, TX 77418

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Defendant's Mailing Address:
825 S. Oak
Bellville, TX 77418

April 4, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 month(s).

The term consists of SEVENTY (70) MONTHS as to Count 1.

Appendix B

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a facility near Bellville, Texas, preferably FCI-Three Rivers or FCI-Bastrop.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The term consists of FIVE (5) YEARS as to Count 1.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

Appendix B

☑ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

☑ See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

Appendix B

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall adhere to the Court ordered schedule for the payment of a fine or restitution, if any.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Appendix B

	Assessment	Restitution
Totals:	$50.00	$2,581,054.55

* * *

RESTITUTION

* * *

☑ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered
Federal Deposit Insurance Corp.	$2,490,152.19	$2,490,152.19
Frost Bank	$90,902.36	$90,902.36
Totals:	$2,581,054.55	$2,581,054.55

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix B

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

* * *

B ☑ $2,581,104.55 immediately, balance due (in accordance with C, D, or E); or

* * *

D ☑ in installments to commence 30 day(s) after the date of this judgment.

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Appendix B

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

* * *

☑ The Court adopts the factual findings and guideline application in the presentence report except:

The last sentence in paragraph 45 should read: Skelton is held accountable for the intended loss of $2,581,054.55.

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: I

Imprisonment Range: 70 to 87 months.

Supervised Release Range: 3 to 5 years.

Fine Range: $12,500.00 to $1,000,000.00

* * *

Total Amount of Restitution: $2,581,054.55

* * *

☑ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C — RE-SENTENCING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED MARCH 20, 2000

JUDGE **VANESSA D. GILMORE**

CASE MANAGER **ESTHELA MARES**

RPTR **BRUCE SLAVIN**

* * *

TIME 9:44 begin 10:10 A.M. end DATE 3-20-00

CR. No. H-97-169-1

UNITED STATES OF AMERICA

VS.

MARK SKELTON

* * *

RE-SENTENCING

☒ ksen. Sentencing held.

* * *

Appendix C

☒ . . . SENTENCE: Ct. 1: 70 months confinement
modified restitution $2,581,054.55
no fine
Ct. recommends that Deft be kept in facility in Tx.
$50 special assessment on Counts 1

☒ . . . Time to Serve.

* * *

☒ . . . Deft ordered to surrender to institution when designated.

* * *

OTHER PROCEEDINGS:
Deft's Motion for Voluntary Surrender –
GRANTED

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED DECEMBER 21, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-20758

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ABRAHAM MELAWER; MARK R. SKELTON; KENNETH R. BURROUGHS; and MARK E. BURROUGHS,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas (H-97-CR-169-2)

Before GARWOOD, SMITH, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Mark Skelton, Abraham Melawer, Kenneth Burroughs, and Mark Burroughs challenge their bank fraud convictions.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix D

We affirm Skelton's conviction on count one but reverse the remaining convictions.

I.

The defendants were indicted for bank fraud in violation of 18 U.S.C. § 1344(1), based on banking activity at Westheimer National Bank ("WNB").[2] Skelton was senior vice president of WNB, and the other three check kiting scheme. In count one, the other participants in the alleged scheme are Ira and James Finlay; in count two the other participant is Melawer; and in count three the other participants are Kenneth and Mark Burroughs.[3] The Finlays pleaded guilty to bank fraud under a plea agreement requiring them to cooperate in the prosecution of Skelton, against whom they then testified.

Count one alleges that over a period of approximately one and one-half years, Skelton approved the payment of checks when there were insufficient funds in the Finlays' accounts, approved immediate credit on deposits and automobile drafts, and deceived the board of directors of

---

2. Section 1344(1) prescribes criminal penalties for anyone who "knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution . . . ."

3. There was also a count four involving criminal forfeiture pursuant to 18 U.S.C. § 982, but this count was dismissed in a post-trial proceeding. Count two alleges that Skelton and Melawer knowingly executed and attempted to execute a scheme and artifice to defraud WNB, each aiding and abetting the other. The allegation in count three is identical as between Skelton and the Burroughs.

WNB with respect to the true nature and extent of unsecured credit thus extended. These actions allegedly inflated the Finlays' account balances and put those inflated balances at their disposal, permitting the Finlays' accounts to become overdrawn.

Counts two and three allege almost identical schemes, count two involving Skelton and Melawer and count three involving Skelton and the Burroughses. Both schemes allegedly took place over a period of slightly less than one year.

Melawer and the Burroughses had several accounts at WNB and other financial institutions, some of which were in the names of corporate entities controlled by either Melawer or the Burroughses, respectively. Skelton allegedly approved the payment of checks when there were insufficient funds in their accounts, approved immediate credit on deposits, and deceived the board with respect to the true nature and extent of unsecured credit thus extended. This inflated the account balances and put them at defendants' disposal, allowing the accounts to become overdrawn. Melawer and the Burroughses allegedly knowingly wrote checks drawn on accounts with insufficient funds; they would deposit these checks into a WNB account at the end of the month to create the appearance of a positive balance during the float.[4]

---

4. The "float" is the time between when the funds are registered in the account and when payment is received by the bank. If immediate credit is available, funds can be withdrawn even if payment will never be received.

Appendix D

II.

The defendants claim there is insufficient evidence to support their convictions. "In evaluating a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and uphold the verdict if, but only if, a rational juror could have found each element of the offense beyond a reasonable doubt." *United States v. Brown*, 186 F.3d 661, 664 (5th Cir. 1999). This review is *de novo*, and "[i]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, a defendant is entitled to a judgment of acquittal." *Id.* (internal quotation marks omitted). Based on this standard of review, we conclude that the evidence is sufficient to sustain Skelton's conviction on count one but that there is insufficient evidence to sustain the remaining convictions of Skelton and the convictions of Melawer, Kenneth Burroughs, and Mark Burroughs.

A.

Because some of the evidence is not admissible against the customer defendants, we first consider Skelton's sufficiency claim as to count one. To convict under § 1344(1), the government must prove beyond a reasonable doubt that the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution. Defendants do not contest their participation in the kiting schemes; rather, they argue a defense of lack of intent to defraud.

Appendix D

Skelton contends that in 1989, WNB was in financial straits and in danger of closing and required some source of increased income, so WNB's management made a decision that fee income would be the bank's main thrust. In particular, it would focus on fees generated by paying checks that otherwise would be returned for insufficient funds, known as "NSF" checks. The bank also would pay checks that were drawn against uncollected balances, which occur when a customer makes a deposit but payment has not yet been received from the bank on which the deposit is drawn.

Creating overdrafts by paying NSF checks and making deposited funds immediately available allowed profitable and continuous check kiting. Skelton claims that these practices were successful in producing much needed income, and further urges that even if the policy was a poor banking decision (as allowing the kiting can lose money in interest paid on the inflated amounts and in effect gives the account holder an unsecured loan), it was not a criminal decision.[5]

For Skelton's argument to succeed, the entire bank entity had to be behind the "policy," for we have previously held that bank officers "with authority to bind their banks to others can nevertheless defraud the institutions they serve." *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992). Thus, in *Saks* defendants who had colluded with bank officers who were co-chairmen of the board and owned a controlling interest in the institution were found guilty of bank fraud: "It is the financial institution itself — not its officers or agents — that

5. In other words, Skelton's characterization is that the bank knew of the kiting and remained silent because it collected fees in exchange for giving preferred customers off-the-books loans.

is the victim of the fraud the statute proscribes." *Id.*; *see also United States v. Aubin*, 87 F.3d 141, 146-47 (5th Cir. 1996). Likewise, bank customers "who collude with bank officers to defraud banks may also be held criminally accountable either as principals or as aiders and abettors." *Saks*, 964 F.2d at 1518-19.

The government presented sufficient evidence to enable a rational juror to reject Skelton's "bank policy" claim. Skelton pushed the Finlays and all three co-defendants to "clear" their overdrafts as of the last day of each month, meaning that those overdrafts would not appear on the monthly report to the board of directors. The customers repeatedly used checks drafted from accounts with insufficient funds for this purpose, and therefore in a manner of days the WNB account would once again return to overdraft status.

Skelton does not contest that he urged the Finlays and other defendants to clear their overdrafts at the end of each month, but he contends that he had no criminal motive in doing so. Ira Finlay testified, however, that Skelton informed him that the reason that accounts must not be overdrawn on the last day of the month is that such overdrawn accounts would appear on the monthly report. Further, James Finlay testified that he informed Skelton that they were using floated funds to cover their monthly overdrafts.

Skelton's desire to keep the overdrafts from appearing on the monthly board report might not be independently sufficient to demonstrate that kiting was not bank policy, but there is abundant other evidence in this regard. Skelton

was also involved in the deletion of certain references to Finlay overdrafts in a quarterly report, and WNB's cashier, Glenda Mayo, testified that Duff informed Skelton of his concern with the Finlays' situation numerous times and expressed concern with the Burroughs and Melawer accounts. In fact, Skelton falsely assured Mayo and other bank employees that the situations either would not continue or that the relevant customers would deposit sufficient collateral to cover the risks of their accounts.

Mayo further testified that Skelton often waived the $25 NSF check fee for the defendants, making it unlikely that focusing on such fee income was the bank's policy. Lastly, she testified that the bank wanted account overdrafts cleared at any time during the month (not just as of the last day of the month), and that such "clearing" was not supposed to be done with an NSF check that would create another overdraft.

Skelton also received cash and in-kind payoffs from Ira Finlay: In addition to certain trailers and perhaps overly generous deals on vehicles, Finlay gave Skelton approximately $500 per week ($100 a day) throughout the period in which the Finlays engaged in the kiting activity. Ira Finlay testified that he withheld cash from checks he deposited in his WNB account, put the cash in a plain envelope, and presented the envelope to Skelton. This testimony was corroborated by two other witnesses: a bank employee who recalled that Ira Finlay often requested cash back from his deposits in hundred dollar bills and requested an envelope at those times; and an employee of Ira Finlay's who both witnessed Finlay giving an envelope to a man at WNB and took an envelope to a man at WNB and took an envelope to a secretary at WNB on behalf of Finlay three or four times.

Appendix D

As to the board's knowledge of Skelton's "policy," the board did not have daily overdraft information in its monthly report. The board chairman, Champion Traylor, Jr., testified that he was surprised to learn the status of the Finlay accounts when it was uncovered by bank regulators and that he did not previously know of any such pattern of immediate credit and large overdrafts. He feels that he was misled as to the financial status of the bank and would have tried to stop the overdraft situation had he known of it. Another member of the board, Doyle Graham, Jr., testified that he was shocked to learn of the Finlay situation and that the board had no information from which it could have predicted that situation until it was uncovered by outside regulators.

A federal bank examiner, Bryan Heath, likewise testified that in reviewing the board reports, he found nothing that would arouse suspicion as to the true state of the accounts at issue. He further testified that most banks earn a significant amount of money from NSF and similar fees and that, in his professional opinion, Skelton's conduct caused the overdrafts to be unknown to the board.

Notwithstanding this evidence, Skelton insists that it was bank policy to clear overdrafts at the end of each month; he stresses that there was nothing preventing the other board members from perusing the bank's daily reports if they so desired. Skelton cites evidence that Duff, Skelton, and Mayo met every day to review all pending NSF checks and checks presented for payment against uncollected balances. Therefore, the senior officers of WNB and at least two members of the board (Duff and Skelton) were aware of Skelton's actions. As noted above, however, there was at

least some controversy among these individuals regarding defendants' accounts, and Skelton presented no evidence from Duff or other board members that such activity was bank policy.

Skelton also points out that in 1992, over 66% of the bank's income came from NSF charges, and therefore he argues that the board must have been aware of his activities. Such a conclusion simply does not follow: An NSF check for $3 that is cleared the next day earns the same $25 fee as an NSF check for $ 1,000 that is not cleared for three months. As far as the information given to the board indicated, the bank was earning substantial income from NSF fees, and only a relatively small number of customers were still in overdraft status at the end of each month (and those not by a significant dollar amount).

Therefore, the board had every reason to believe that, although there must be a substantial number of NSF checks being paid to generate that much fee income, the resulting overdrafts were consistently cleared with legitimate funds in relatively short periods of time, leaving the bank in a comparatively low-risk situation. In fact, this was not the case.

As we have said,

> [c]heck kiting is a scheme designed to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds. Section 1344(1) does not require a specific intent

> to permanently deprive the bank of its funds. It is sufficient to knowingly participate in a scheme to trick the bank into inflating bank balances by kiting checks between two or more banks. The bare act of check kiting defrauds the bank by temporarily placing the bank's funds at the disposal of the account holder.

United States v. Frydenlund, 990 F.2d 822, 824 (5th Cir. 1993) (internal quotation marks and citations omitted). Under this test, a rational juror could find that the government proved Skelton's guilt on count one beyond a reasonable doubt; the evidence makes it rational to reject Skelton's contention that there was never any intention to "trick" the bank.

B.

While some of the evidence discussed above also is relevant to the culpability of Melawer and the Burroughses, much of it is not, and there is not sufficient evidence for a rational juror to find that beyond a reasonable doubt these defendants intended to defraud WNB. The government presented no convincing evidence that Melawer and the Burroughses were doing anything more sinister than banking pursuant to policies expounded by their friend Skelton in his official capacity.

Skelton had business relationships with Melawer and the Burroughses beyond their banking concerns; the defendants do not deny that they might be considered friends in this regard. The evidence also made clear that both

Melawer and the Burroughses knowingly "cleared" overdrafts with bad checks, and the defendants presented no evidence that they were in fact told that this was acceptable bank policy.

The government bears the burden of proof, however, and must therefore prove that these defendants had the intent of tricking the bank. There is no evidence in this regard. Although the customer defendants engaged in conduct in a repeated pattern that ultimately caused WNB to lose money, there is no evidence that they did so without the authority of the bank, or at least without the apparent authority of the bank through Skelton. Therefore, no rational juror could have found that the government proved the guilt of Melawer, Kenneth Burroughs, or Mark Burroughs beyond a reasonable doubt; we therefore reverse their convictions based on insufficiency of the evidence.

C.

Having reversed the convictions of Melawer and the Burroughses, we must also reverse the conviction of Skelton on counts two and three. The government alleged execution of a scheme to defraud WNB through the actions of Melawer and the Burroughses. Having found insufficient evidence of criminal intent motivating those actions, we find insufficient evidence that Skelton aided and abetted any scheme to defraud WNB in counts two and three.

Appendix D

A.

Skelton claims several other issues on appeal. None presents reversible error.

A.

Skelton claims that the district court erred in finding that defendants were properly joined under FED. R. CRIM. P. 8(b),[6] and alternatively that the court abused its discretion in denying his motion to sever pursuant to FED. R. CRIM. P. 14. A claim of misjoinder is reviewable on appeal as a matter of law; if the limits of rule 8(b) are exceeded, severance will be granted unless the court concludes that the error was harmless. *See United States v. Maggitt*, 784 F.2d 590, 595 (5th Cir. 1986).

The defendants did not participate in the same act or transaction, and therefore for joinder to be proper under the rule, they must have participated in "the same series of acts or transactions constituting an offense or offenses." In *United States v. Marionneaux*, 514 F.2d 1244, 1248-49 (5th Cir. 1975), this court defined the phrase "the same series of acts

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6. Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

or transactions" as requiring a "substantial identity of facts or participants" between two offenses. Because the only identity of participants is Skelton's role in all counts, there is no substantial identity of participants to satisfy the rule.[7]

Therefore, to satisfy rule 8(b) there must be a substantial identity of facts among the defendants' offenses.

> Whether or not separate offenses are part of a 'series of acts or transactions' under 8(b) depends on the relatedness of the facts underlying each offense. When the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper.

Welch, 656 F.2d at 1049. This court has previously found joinder to be improper where multiple defendants were joined without the requisite substantial identity of facts. *See, e.g.*, *Lane*, 735 F.2d at 799; *Levine*, 546 F.2d at 658.

We need not decide this issue, however, because even if misjoinder did occur, it was harmless as to Skelton. "[A]n error involving misjoinder affects substantial rights and requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." *Lane*, 474 U.S. at 449 (internal quotation marks omitted).

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7. *See United States v. Lane*, 735 F.2d 799, 804-05 (5th Cir. 1984), *rev'd on other grounds*, 474 U.S. 438 (1986); *United States v. Welch*, 656 F.2d 1039, 1049 (5th Cir. Unit A Sept. 1981); *United States v. Levine*, 546 F.2d 658, 664-66 (5th Cir. 1977).

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Melawer and the Burroughses were tried for bank fraud based on their banking interactions at WNB. Skelton was tried for bank fraud based on his role in those very interactions. Joinder therefore did not prejudice Skelton, making any misjoinder harmless error.

Likewise, the court did not err in denying Skelton's motion to sever pursuant to FED. R. CRIM. P. 14. That rule provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Balancing the right of a defendant to a fair trial against the interests of judicial economy is within the discretion of the court, and we will not reverse absent abuse of discretion. *See United States v. Morrow*, 177 F.3d 272, 290 (5th Cir.), *cert. denied*, 120 S. Ct. 333 (1999); *United States v. Zicree*, 605 F.2d 1381, 1388 (5th Cir. 1979). To demonstrate abuse of discretion, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial, and such prejudice must be of a type against which the trial court was unable to afford protection." *Morrow*, 177 F.3d at 290 (internal quotation marks omitted). Skelton contends that he was prejudiced by joinder both because joinder prevented him from calling Melawer and the Burroughses to the stand to give exculpatory testimony

(because of their Fifth Amendment privilege against self-incrimination) and because of guilt by association (prejudice from evidence admitted with respect to other counts and other defendants resulted in spillover prejudice in the minds of the jurors).

Skelton argues that a key issue is what he told each of the co-defendants regarding the reason for that defendant's making a deposit at the end of each month, especially in light of the testimony of Ira Finlay that Skelton told him the monthly board meetings were the reason. By joining Melawer and the Burroughses, Skelton was prevented from calling them as witnesses on his behalf. Likewise, because there was evidence of payments from the Finlays, Skelton argues that there was an implication that payment was made by the other defendants as well; once again Skelton was prevented from calling them as witnesses on his behalf.[8]

In *United States v. Rocha*, 916 F.2d 219, 231-32 (5th Cir. 1990), we held that

> [e]xculpatory testimony in some cases may provide the basis for a severance. In order to demonstrate a prima facie case for severance to introduce exculpatory testimony of a co-defendant,

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8. Although Skelton argues that he met the criteria of rule 14, he does not seem to argue that regardless of that rule, denial of a severance violated his Sixth Amendment right to compulsory process. Even assuming he has asserted that claim, he did not establish "specific and compelling prejudice" necessary to demonstrate a violation of his Sixth Amendment right. *See United States v. Villarreal*, 963 F.2d 725, 732 (5th Cir. 1992).

> a defendant must show: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant would in fact testify if severance were granted.

Skelton has not indicated, and a review of the record does not reveal, that any such showing was made. Therefore, the court did not abuse its discretion in denying severance on this ground.

There is no merit to Skelton's claim of spillover prejudice resulting from evidence that would have been inadmissible against him had the defendants/counts not been joined. "The test for severance under Rule 14 is whether the jury could sort out the evidence reasonably and view each defendant and the evidence relating to that defendant separately. If cautionary instructions are deemed sufficient, severance is not required." *United States v. Merida*, 765 F.2d 1205, 1219. (5th Cir. 1985). Skelton does not identify any evidence admissible only against his codefendants that prejudiced him, nor any evidence admissible only on one count that prejudiced him on other counts in light of his common modus operandi in all three counts. Therefore, the court did not abuse its discretion in denying severance.

B.

Skelton claims the court erred in admitting evidence of, and evidence produced by, the government's use of computer software in analyzing the check kites. We review evidentiary rulings for abuse of discretion. *See Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 667 (5th Cir. 1999).

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Special Agent Morehart, an expert in financial crimes, testified on behalf of the government. His testimony included his manual analysis of the defendants' account activity and a computer analysis performed by software named "Check Kite Analysis System," or CKAS. CKAS, developed by the FBI, is apparently a relatively simple program used to analyze possible check kiting activity. It is beneficial not because of the complexity of its underlying operations, but because it can tally the results when a large number of transactions (deposits and withdrawals) are involved. Skelton claims that the evidence was irrelevant and prejudicial and that the district court abrogated its gatekeeping role under *Daubert* and its progeny. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

We have described the gatekeeper role as follows:

> The district judge must first determine whether the proffered testimony is reliable, requiring an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid. Second, the district judge must determine whether that reasoning or methodology can be properly applied to the facts in issue; that is, whether it is relevant.

Curtis, 174 F.3d at 668. The government introduced pedigree information on CKAS through its expert, most significantly that in his experience with the program he had found its results to be consistent with manual calculations, and that its underlying theory made it little different from a glorified calculator.

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When complex scientific or other expert evidence is at issue, the district court must scrutinize whether the reasoning or methodology underlying it is valid; there is no such issue regarding CKAS. Morehart's testimony regarding its functionality, and his experience with its results, adequately demonstrate its reliability.

The second part of the gatekeeper role, whether that reasoning and methodology are relevant, is also straightforward: The expert described his use of the program, its results, the results of his manual analysis, and the relevance of each. The testimony was neither irrelevant nor improperly prejudicial. Therefore, the court did not abuse its discretion in allowing the testimony.

C.

Skelton claims the court erred in admitting evidence of internal WNB rule violations and federal regulatory violations. The government, over objection, introduced evidence of the internal lending limit imposed on Skelton by the board of directors, the loan limit to a single customer imposed on WNB as a whole, and a statement by an employee of the Office of the Comptroller of the Currency ("OCC") that overdrafts were not a safe banking practice.

All three elements are relevant circumstantial evidence regarding why Skelton might have allowed the "loans" through kiting and why he did not want the amounts reflected on the monthly board report. There is no evidence that this testimony was introduced or used in any manner that would lead the jury to believe that violation of those regulatory

principles was equivalent to a criminal violation. Therefore, *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980), is inapposite, and the court did not abuse its discretion in admitting the evidence.[9]

D.

Skelton claims the court erred by not granting a new trial based on, or at least holding an evidentiary hearing to investigate, information that one of the jurors was prescribed a muscle relaxant during the trial, that the jurors discussed the case in groups during the course of the trial, and that a juror approached a prospective defense witness regarding the trial. We review the denial of a motion for new trial for abuse of discretion — the procedures used to investigate allegations of juror misconduct and the decision as to whether to hold an evidentiary hearing are matters within the sound discretion of the district court. *See United States v. Jobe*, 101 F.3d 1046, 1057-58 (5th Cir. 1996).

Skelton argues that he was effectively improperly tried by a jury of only eleven, because a juror imbibed a prescription muscle relaxant that caused her to "doze off

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9. In *Christo*, regulatory violations were not only included in the indictment and emphasized throughout the trial, but the court's instructions regarding the regulatory violations focused the jury's attention on those prohibitions and made it impossible for this court to tell whether Christo had been found guilty under the criminal section at issue or merely for the regulatory violations. *See Christo*, 614 F.2d at 491-92. Nothing even remotely akin to that level of emphasis occurred in this case. *See United States v. Saks*, 964 F.2d 1514, 1522-23 (5th Cir. 1992).

during trial." This information was disclosed to Skelton's counsel through "an unsolicited telephone call after the trial," which call also apparently included information that the jurors had discussed the case in groups of two or three throughout the trial.

Skelton contends that the court erred in failing to hold an evidentiary hearing regarding, or accept his motion for new trial based on, this information. He admits to finding no case on point, but states that "[i]f a person is advised not to drive or operate heavy machinery, a common warning with muscle relaxers [relaxants], it seems self evident that the juror had to rely on the recollections of other jurors and could not have formed her own opinion based on all the evidence." Such a generic claim does not rise to a level requiring a court to investigate further, especially in light of the limited ability of a court to inquire into jury deliberations under FED. R. EVID. 606(b), and therefore the district court did not abuse its discretion.

Skelton also raises, but does not argue, error based on the court's handling of juror contact with a potential witness. During trial, the court was informed by the government that one of the jurors had approached a potential defense witness, Sam Goldman of the OCC, at a school track meet. The juror apparently asked Goldman whether he knew anything about WNB. Goldman responded that he was not going to discuss that issue and that the juror should not be asking that question.

Instead of questioning the juror about the incident, the court admonished the jury not to discuss the case with

anyone. Skelton contends that this constituted error. In *Jobe*, 101 F.3d at 1057-59, we considered a similar challenge on very different facts. Billie Mac was convicted of, *inter alia*, bank fraud. During trial, one of the jurors discussed the case with a relative and was told that Billie Mac had previously been convicted in another bank fraud case. Even though this "knowledge" was technically incorrect, and the district court denied an evidentiary hearing to investigate and denied a new trial, we affirmed.

Although in *Jobe* the district court did have an affidavit of the juror, the critical difference between *Jobe* and the instant case is that here, there is no evidence of any extrinsic information's reaching any juror. The *Jobe* court recognized a presumption of jury impartiality that may be defeated through evidence that extrinsic factual matter tainted the jury's deliberations. *See id.* at 1058. We therefore stated that a court "must investigate the asserted impropriety only when a colorable showing of extrinsic influence is made." *Id.*

Skelton made no such showing: The information presented to the court indicated that no extrinsic evidence was communicated, and the court had no reason to believe the situation was otherwise. Therefore, the court did not abuse its discretion in choosing to admonish the jury not to discuss the case with anyone.

E.

Skelton claims the court erred in limiting the scope of his expert's testimony. During government voir dire, Sam James Pierce testified that he was qualified as an auditor

(He is a certified public accountant and had experience as an auditor with the FDIC and other organizations) but was not qualified to investigate fraud, had never been a bank examiner or lending officer, and had very little experience with check kiting. The court therefore limited him to testifying on matters of accounting.

We review the exclusion of expert testimony for abuse of discretion. *See United States v. Willis*, 38 F.3d 170, 174 (5th Cir. 1994). Skelton rests his argument on an irrelevant premise: that when the government has been allowed to present its version of how banks should be operated, the defense should be afforded the same opportunity. The court did not deny that opportunity in this case — it merely required that Skelton present a witness qualified to testify to such matters. The court did not abuse its discretion in limiting Pierce's testimony to his area of expertise.

F.

Skelton claims he is entitled to a new trial based on the cumulative error doctrine. In *United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984), we recognized that "the cumulative effect of several incidents of . . . misconduct may require reversal, even though no single one of the incidents, considered alone, would warrant such a result." As in *United States v. Moye*, 951 F.2d 59, 63 n.7 (5th Cir. 1992), because there is no merit to any of Skelton's claims of error, his claim of cumulative error must also fail.

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G.

Skelton claims the indictment either provided inadequate notice or was constructively amended. First, he avers that the indictment alleges that he deceived the board of directors, when the crime is to deceive WNB itself. Second, he contends that the indictment did not adequately allege how he deceived the board or how he aided and abetted Melawer and the Burroughses in executing a scheme to defraud. Lastly, Skelton contends that the indictment was constructively amended at trial, because the indictment alleges that he made immediate credit available to persons (Melawer and the Burroughses), but he was convicted of making immediate credit available to corporations (Some accounts were held in the name of corporations that Melawer or the Burroughses controlled.). All three claims are meritless.

We review the sufficiency of an indictment de novo. *See United States v. Crow*, 164 F.3d 229, 234 (5th Cir.), *cert. denied*, 119 S. Ct. 2051 (1999). The indictment must conform to minimal constitutional standards, and "[t]he proper test for determining the validity of the indictment is whether or not the defendant has been prejudiced by the alleged deficiency." *Id.* at 234-35.

> An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense. An indictment is read for its clear meaning and convictions will not be reversed for minor deficiencies that do not prejudice the accused.

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United States v. Skelton, 937 F.2d 140, 142 (5th Cir. 1991) (internal citation and quotation marks omitted).

Not only would the minor issues raised by Skelton not have prejudiced his defense, but the indictment was not in fact flawed. It does allege that Skelton defrauded WNB and does describe the manner in which he executed the schemes to defraud — namely, by allowing overdrafts, granting immediate credit, and encouraging "removal" of the overdraft on the last day of the month.

"A constructive amendment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. If we find that the indictment has been constructively amended, we must reverse the conviction.". *United States v. Holley*, 23 F.3d 902, 912 (5th Cir. 1994) (internal citations and quotation marks omitted).

There was no constructive amendment. The evidence demonstrated that Skelton made immediate credit available to the accounts at issue; some of those accounts were held in the name of corporations controlled by defendants. In this manner, Skelton made immediate credit available to the corporations and thus to those controlling the corporations, which persons did in fact exploit that credit as alleged. Skelton does not claim that any of the corporations at issue were not controlled by the named defendants, but merely that the jury was allowed to convict him for making immediate credit available to corporations when the indictment charged that he made that credit available to the persons controlling those corporations. This does not

constitute modification of an "essential element of the offense charged," and therefore no constructive amendment occurred.

H.

Skelton claims that he was improperly convicted on the basis of the uncorroborated testimony of an accomplice, Ira Finlay. This claim has no merit — Finlay's testimony was corroborated by bank records and substantial other evidence. Even Finlay's testimony regarding the payoffs was corroborated by testimony of a bank employee and of Finlay's employee. *See* part II.A., *supra*.

In summary, Skelton's conviction on count one is AFFIRMED; his conviction on counts two and three and the convictions of Melawer, Kenneth Burroughs, and Mark Burroughs are REVERSED and REMANDED for entry of judgments of acquittal.[10]

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10. Skelton's convictions on counts two and three did not affect the guideline range on count one, but resentencing is necessary to allow recalculation of the special assessment and amount of restitution.

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOLDING SESSION IN HOUSTON) DATED OCTOBER 18, 1998 AND ENTERED OCTOBER 21, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Holding Session in Houston

Case Number: 4:97CR00169-001

UNITED STATES OF AMERICA

v.

MARK R. SKELTON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

O.W. Bussey, Jr.
Defendant's Attorney

THE DEFENDANT:

* * *

☑ was found guilty on count(s) 1, 2, and 3 on April 13, 1998 after a plea of not guilty.

Appendix E

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1344 and 2	Bank Fraud	03/13/1993	1-3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
451-82-6377

October 5, 1998
Date of Imposition of Judgment

Defendant's Date of Birth:
11/28/1947

Defendant's USM No.:
76295-079

s/ Vanessa D. Gilmore
Signature of Judicial Officer

Defendant's Residence Address:
825 S. Oak
Bellville, TX 77418

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Appendix E

Defendant's Mailing
Address:
825 S. Oak
Bellville, TX 77418

10-18-98
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 month(s).

The term consists of SEVENTY (70) MONTHS as to Counts 1, 2, and 3, to run concurrently.

* * *

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ as notified by the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The term consists of FIVE (5) YEARS as to Counts 1, 2, and 3.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Appendix E

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☑ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

☑ See Special Conditions of Supervision – Sheet 3.01

Appendix E

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Officer of any material change in the defendant's economic

circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall adhere to the Court-ordered schedule for the payment of a fine or restitution, if any.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Restitution
Totals:	$150.00	$3,100,158.33

* * *

RESTITUTION

* * *

☑ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Appendix E

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered
Federal Deposit Insurance Corp.	$3,009,255.97	$3,009,255.97
Frost Bank	$90,902.36	$90,902.36
Totals:	$3,100,158.33	$3,100,158.33

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

* * *

B ☑ $3,250,158.33 immediately, balance due (in accordance with C, D, or E); or

* * *

D ☑ in installments to commence 30 day(s) after the date of this judgment.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix E

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

In reference to the amount below, the Court ordered restitution shall be joint and several with any co-defendant who has been or will be ordered to pay restitution under this docket number.

☑ Joint and Several

Case Number (Including Defendant No.)	**Defendant Name**	**Joint and Several Amount**
4:97CR169 et al	See Court's Order above	$3,100,158.33

* * *

Appendix E

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

* * *

☑ The Court adopts the factual findings and guideline application in the presentence report except:

The last sentence in paragraph 45 should read: Skelton is held accountable for the intended loss of $3,100,158.33.

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: I

Imprisonment Range: 70 to 87 months.

Supervised Release Range: 3 to 5 years.

Fine Range: $12,500.00 to $1,000,000.00

* * *

Appendix E

Total Amount of Restitution: $3,100,158.33

* * *

☑ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX F — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 17, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20268

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

MARK R SKELTON

Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before KING, Chief Judge, and REAVLEY and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED.

Appendix F

IT IS FURTHER ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
United States Circuit Judge